

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 449 of 1980

with

CIVIL APPLICATION NO. 6448 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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HEIRS OF ANJANA SAMJI CHELA

Versus

HEIRS OF ANJANA HIRJI AHIJI  
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Appearance:

MR SM SHAH for Appellants

MS KUSUMBEN M SHAH for Respondents  
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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 04/07/2000

ORAL JUDGEMENT

This appeal arises from the impugned judgment and decree dated 29.9.1979 rendered by the learned Civil Judge (SD) at Palanpur in Special Civil Suit No. 10/66

dismissing the plaintiffs' suit with costs. The appellants are the plaintiffs in the suit and the respondents are the defendants therein.

The plaintiffs filed the aforesaid suit for possession of the suit premises consisting of two house site plot and agricultural lands as described in the plaint and for mesne profits at a yearly rate of Rs. 175/per house site plot and Rs. 525/ for agricultural lands for a period of three years before the date of the filing of the suit and for a period commencing from the date of the suit till the possession of the suit property is delivered by the defendants to the plaintiff. According to the plaintiff, they are full brother and sister. Their father died about a year before the date of the suit. They have claimed rights in the suit properties as agnates in the family headed by Samabhai Surjibhai as per the pedigree set out in para-4 of the plaint. One Daljibhai Sardar is their cousin in the line of Ramsing Samabhai. The said Daljibhai Sardar died on 18.12.1959 intestate leaving behind his widow Bai Mena, who happened to be the daughter of Rajsangh Ganeshbhai. She, however, remarried with one Anjan Danraji Devji of Jagan village and has been residing with him as his wife. On account of such remarriage after the death of her husband Dalji Sardar, she would not get any interest in the suit properties left behind by Dalji Sardar. The plaintiffs have, therefore, claimed the suit properties as devolving on them. It has also been asserted that defendant no.2's husband Anjana Hirji Ahji- father of the defendants no. 3 to 6, in collusion with Anjana Jita Chela, put up a false case that the late Dalji Sardar has executed a Will under which, all the properties were bequeathed to Anjana Hirji Ahji and Jita Chela. It has also been asserted that these Anjana Hirji Ahji and Jita Chela have no interest in the suit properties under any of the provisions of Hindu Succession Act, 1956 ( hereinafter referred to as 'the Act'). The plaintiffs have asserted that during the life time of Dalji, all the suit properties were in his actual possession as the owner thereof. He, however, died of Tuberculosis on 18.12.1959. It has been alleged that by taking advantage of the alleged Will, Anjana Hirji Ahji and Jita Chela unlawfully took the possession of the suit properties. They in the process tried to get their names mutated in the record of rights. The plaintiffs resisted such an action on the part of the said defendants as per the particulars set out in the plaint. Still however, mutations were effected by the Revenue Authorities against the objections of the plaintiffs. Under such circumstances, the possession of the aforesaid defendants

is that of trespassers.

The defendants resisted the plaintiffs' suit for possession and other reliefs denying the plaintiffs' case with regard to their relationship with deceased Dalji Sardar, as also denying the pedigree set out by the plaintiffs. They however, admitted that the Dalji Sardar died on 18.12.1959 but after executing the last Will bequeathing the properties to the aforesaid defendants. They have asserted that the defendant no. 7 being the widow of late Dalji Sardar did not remarry till the life time of Dalji Sardar. Thus, Dalji Sardar left behind him Mena Bai being his widow as his heir. Over and above the said Mena Bai, deceased Dalji left behind him Kunvarben, his mother and two sisters namely Menaben and Avalben. It might be noted that these two ladies have been described as Sardar's sisters i.e. Dalji's father's sisters. Jita Chela being the father of defendants no. 3 to 6 and defendant no. 2's husband, are the brothers of Kunvarbai. Thus, Menaben and Kunvarben are the heirs of the first schedule of the Act, while another ladies namely Bai Mena and Avalben are the heirs of the second schedule of the Act, in so far as deceased Dalji Sardar is concerned.

The defendants have also denied the allegations that they are the trespassers in the suit properties. They have contended that they were cultivating the lands in question as Dalji was not able to cultivate the same. They have been in possession of the agricultural lands by virtue of the provisions contained in Bombay Tenancy and Agricultural Act, 1956.

The defendants have finally contended that they are in adverse possession of the suit properties in question as they have been in possession thereof for more than 12 years before the date of the suit.

In the back ground of the aforesaid facts, the defendants have claimed to be in lawful possession of the suit properties and have prayed for dismissal of the suit with costs.

The Trial Court framed issues at Ex. 26, they are as under:

- 1) Whether the plaintiffs no. 1 and 2 are the only heirs of the deceased Anjana Dalji Sardar as the nearest agnates under the Hindu Succession Act, 1956?

- 1A) Whether it is proved that the mother of the deceased and his father's sisters Manbai and Avalbai are living, if yes, whether the present suit can be filed by the plaintiffs alone?
- 2) Whether the plaintiffs prove that the defendants are unauthorisedly and wrongly in possession of the suit (property) as shown in para-6 of the plaint?
- 2A) Whether the defence based on the strength of alleged Will is maintainable in absence of probate or letters of administration ?
- 3) Whether it is proved that the deceased Anjana Dalji did not die intestate at all but he had made the alleged Will ?
- 4) Whether the alleged Will of the deceased is admissible in evidence, If yes, what is its effect on this suit ?
- 5) Whether the defendants prove that the deceased Anjana Dalji Sardar had disposed of his movable as well as immovable properties by making Will before his demise and had appointed them as heirs thereunder as alleged in para 5 of the written statement ?
- 6) Whether it is proved that the alleged Will is the last will and that it had been properly executed and is valid in its terms and characteristics as to the disposal of the properties there-under?
- 7) Whether the defendants prove that in view of the alleged Will the heirs appointed there under viz. the defendants are entitled to the property of the deceased and not the plaintiffs as heirs under the Hindu Succession Act as alleged in the para 7 of the written statement ?
- 8) Whether the defendants prove that the plaintiffs are not the heirs of the deceased but his widow and some other persons shown in para 9 and 10 of the written statement are the real heirs under the Hindu Succession Act?
- 9) Whether the plaintiffs prove that by her remarriage the widow of the deceased Anjana Dalji

had forfeited her rights and interest in the properties of the deceased ?

- 10) Whether the defendants prove that by remarriage the right to succession of the heirs so remarried is not affected at all under the law as it stands?
- 11) Whether the defendants prove that they have been enjoying the possession of the suit agriculture land as tenant and as such they have become the deemed purchaser under the Tenancy Act?
- 12) Whether the defendants prove that as result of their confirmed status as deemed purchaser of the said land and after due enquiry as to the alleged Will their names have been validly entered as Kabjedar in the Government revenue records as alleged in para 15 of the written statement?
- 13) Whether the suit is time barred?
- 14) Whether this Court has got no jurisdiction to hear and decide this suit, if yes, what is the effect of this suit ?
- 14A) Whether the plaintiffs prove that by relinquishment of her right as to the succession of the property of her husband the widow of Anjana Dalji Sardar has ceased to be the heir of the deceased ?
- 15) If so, whether the plaintiffs are entitled to the possession of the suit property as shown in para-6 of the plaint from the defendants or any one of the defendants in whose possession it is found ?
- 16) Whether the plaintiffs are entitled to mesne profits ?
- 17) What order and decree ?

The trial court answered the issues in favour of the defendants holding that the plaintiffs failed to prove that they were the only heirs of deceased Anjana Dalji Sardar as the nearest agnates under the Act, that mother of deceased Dalji and his father's sisters Bai Mena and Bai Aval were living, that the plaintiffs failed to prove that the defendants were in unauthorised or

wrongful possession of the suit properties, that the defence based on the strength of the Will, though was maintainable in absence of probate or letters of administration was not available to the defendants as they failed to prove the alleged Will of deceased Dalji, but plaintiffs were not the heirs of deceased Dalji as alleged by them, that widow of deceased Dalji had forfeited her rights/interest in the suit properties upon her remarriage, that the defendants failed to prove that they were in possession of the suit properties as the tenants thereof, and that they were accordingly deemed purchasers, and that as a result of the aforesaid findings, the plaintiffs' suit deserved to be dismissed.

In order to appreciate the submissions made on behalf of the rival parties in this appeal, it would be appropriate to set out a few facts which cannot now be disputed.

Although the plaintiffs have set out the pedigree in the plaint, they have admitted that Sardar died leaving behind widow Kunvarben and his son Dalji when Dalji was around 2 to 4 years of age. She had remarried when Dalji was quite young. Dalji inherited the suit properties belonging to his father Sardar to the exclusion of Kuvar, who had remarried, by virtue of the provisions contained in Section -2 of Hindu Widow's Remarriage Act, (15 of 1856). It is, therefore, clear that Dalji became the sole owner of the suit properties. It cannot now be disputed that Dalji died intestate on 18.12.1959 leaving behind his widow Bai Mena and his mother Bai Kuvar, over and above other respective defendants. It might be noted that the defendants filed cross-objections, but they have not re-agitated the testamentary succession canvassed by them, but not accepted by the trial court. It has also not been disputed that the plaintiffs do not belong to any of the categories of the Class-I or the class-II of the schedule to the Act. Mr. SM Shah learned advocate appearing for the appellants-plaintiffs frankly conceded that it would not be possible for him to get out from the findings of facts rendered by the trial court particularly with regard to Bai Mena, deceased Dalji's father Sardar's sister being the surviving heir as referred to in the second class of the schedule to the Act and, entitled to suit properties. He, however, submitted that claim of Kunvar widow of deceased Sardar as the heir of deceased Dalji, on account of the fact that she happened to be deceased Dalji's mother would deserve to be considered by this Court in the light of recent decision of the Apex Court in the case of Velamuri Venkata Sivaprasad (dead) by

LRs. vs. Kothuri Venkateswarlu (dead) by LRs. and Ors., reported in AIR 2000 SC 434. Mr. Shah's main submission revolved around the facts and events which have occurred during the pendency of this appeal. It has been asserted by the plaintiffs in Civil Application No. 448/98 that Bai Kuvar and Bai Mena died on 20.12.96 and 27.12.1997 respectively and, therefore, even if they were accepted as the heirs to inherit properties of deceased Dalji, upon their death, only the plaintiffs would be entitled to the suit properties and none of the defendants. He alternatively submitted that even if Bai Mena who died on 27.12.1997 is shown to have left behind her heirs who can contest the claim of the plaintiffs, it will be just and proper for this Court to remand the matter to the trial court for deciding the rival claims as between the plaintiffs and heirs and legal representatives of deceased Bai Mena. Mr. Shah finally submitted that the defendants being the trespassers cannot be heard to say that some one else and not the plaintiffs would be entitled to inherit the suit properties left behind by deceased Dalji.

In reply, Ms. Kusumben Shah learned advocate for the respondents submitted that the estate of deceased Dalji came to be inherited by both Bai Kunvar, his mother and failing her Bai Mena, his father's sister, and upon their respective demise, their heirs as particularised in the plaint and as particularised in the reply to the Civil Application would inherit the same.

The submissions so made by the learned advocates for the rival parties, might be considered in the back ground of the aforesaid facts which cannot be disputed.

Bai Kunvar

It is not in dispute that Bai Kuvar widow of Sardar remarried after her husband Sardar died. She had Dalji, her son, quite young to be attended to. On account of her such remarriage, she faced the legal disability with regard to forfeiture of her rights to the properties left behind by her husband Sardar. This could be visualised from Sec.2 of of the Hindu Widow's Remarriage Act ( 15 of 1856 ). However, Dalji being the son of Sardar and the only heir inherited the suit properties right from the time he was quite young. It is not in dispute that he held the suit properties through out his life time as the sole owner thereof. It is also not in dispute that he died of tuberculosis on 18.12.1959 i.e. to say more than three years after passing of the Act ( Hindu Succession Act, 1956 ) and, therefore,

succession upon his death will obviously be governed by the provisions of the Act. However, Mr. Shah learned advocate for the appellants has following excerpted passages from para-27 and para-48 of Velamuri Venkata (supra) to be canvassed :

"Section 2 of the Hindu Widow's Remarriage Act, 1856, therefore, has taken away the right of widow in the event of remarriage and the Statute is very specific to the effect that the widow on remarriage would be deemed to be otherwise dead. The words "as if she had then died" occurring in S. 2 of 1856 Act are rather significant. The legislature intended therefore that in the event of a remarriage the next heirs of her deceased's husband shall thereupon succeed to the same. It is thus a statutory recognition of a well reasoned pre-existing Shastric law.

However, since wife widow got remarried to her brother-in-law in the year 1953, the marriage is a void marriage, but that does not obliterate the disqualification from inheritance by reason of remarriage. Voidness of marriage cannot be termed to be an absolute nullity. In the contextual facts, the doctrine of sincerity has its due application. Widow cannot take advantage of her own immoral conduct and illegality to confer upon herself a right to continue to get maintenance from the properties of her deceased husband under the consent decree. The Madras Hindu (Bigamy, Prevention and Divorce) Act of 1949 being penal in nature, was introduced in the Statute Book to prohibit bigamous marriages and to provide for a right of divorce on certain grounds as mentioned therein, statutory prohibition cannot be treated to be in aid of conferment of right, it is a prohibitory statute and not a conferring statute. Any mechanical and literal applicability of the Act of 1949 would lead to incongruity as well as absurdity since in the event the widow is married to a person without having a spouse living- the widow divests herself of any right to deceased's properties by reason of S. 2 of the Act of 1856, but in the event the widow is married to a person with a spouse living, the same tantamounts to no marriage and resultantly entitlement under the general law would be available to the widow: what has been prohibited would, in effect, amount to conferment of a right of inheritance on the deceased husband's property- this is contrary to all canons of law."

In reply, learned advocate for the respondents referred to earlier decision of the Apex Court in the



case of Smt. Kasturi Devi vs. Deputy Director of Consolidation & Ors., reported in AIR 1976 SC 2595. Following observations head noted from para-3 of the citation read as under:

"A mother cannot be divested of her interest in the property on the ground of remarriage. The application of bar of inheritance to the Hindu Widow is based on the special and peculiar, sacred and spiritual relationship of the wife and the husband. After the marriage, the wife becomes an absolute partner and an integral part of her husband and the principle on which she is excluded from inheritance on remarriage is that when she relinquishes her link with her husband even though he is dead and enters a new family, she is not entitled to retain the property inherited by her. The same, however, cannot be said of a mother. The mother is in an absolutely different position and that is why the Hindu Law did not provide that even the mother would be disinherited if she remarried."

It has been submitted by her that a widow might divest herself of any right to her deceased husband's properties by reason of Sec. 2 of the Act of 1856, in the event she remarries. Such disability is a legal disability as envisaged by Sec. 2 of the Act of 1856 in the context of she being a widow. Such is not the legal position when her son leaves her behind irrespective of the fact that she has remarried after the death of her husband. She is very much entitled to inherit the properties left behind by her son as she belongs to class-I of first schedule to the Act (Hindu Successions Act, 1956). Reference in this connection has also been made to a decision of Madhya Pradesh High Court in the case of Mantorabai v. Parentanbai & Anr., reported in AIR 1972 M.P. 145 in support of the last mentioned submission. Learned advocate for respondents has further submitted that the mother inherits simultaneously with a son, widow, daughter, and other heirs specified in Class-I of the Schedule and she would take her share absolutely. Unchastity on her part will not be a bar of her succeeding as the heir to her son. Similarly, divorce or remarriage will not constitute any such bar. Reference to her legal death in sec. 2 of the Act of 1856, cannot be read to mean that she is physically dead. She is obviously physically alive to inherit, if law permits, the estate of her relatives other than her deceased husband. In my considered opinion, there is a great deal of substance in the submissions made by the

learned advocate for the respondents. Bai Kunvar, as the mother of deceased Dalji, would obviously be entitled to inherit her son's property as the heir belonging to Class-I of the Schedule to the Act referable to Section -8 of the Act.

Bai Mena

Mr SM Shah learned advocate appearing for the appellants however did not pursue the matter in so far as Bai Mena, deceased Dalji's father Sardar's sister whose claim has been accepted by the learned trial judge, is concerned. However, Mr Shah submits that upon her demise during the pendency of the appeal, the properties would revert to the plaintiffs being the agnates of deceased Dalji and not the heirs of Bai Mena, Sardar's sister. This submission deserves to be rejected as succession to whatever properties or share in properties left behind by Bai Mena would obviously devolve in favour of her heirs as particularised in Sec. 15 of the Act. In the present case, heirs or some of them of deceased Bai Kunvar and Bai Mena are on record. In that view of the matter, the submission that either the plaintiffs' suit should be decreed by this Court or the matter should be remanded to the trial court for deciding the rival claims of the parties, cannot be accepted.

In view of what is stated above, the submissions that the defendants stand in the capacity of trespassers also cannot be accepted and the findings of facts with regard to such allegations made by the plaintiffs would remain unassailable.

In the result, this appeal as well as Civil Application No. 6448/98 would fail. The same are dismissed with no order as to costs.

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